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No. 83-1377

IN THE

# Supreme Court of the United States

**OCTOBER TERM, 1983**

JOYCE BARR,

*Petitioner,*

v.

UNITED AIR LINES, INC.,
ASSOCIATION OF FLIGHT ATTENDANTS, and
LIANE BUIX McDONALD,

*Respondents.*

## BRIEF OF ASSOCIATION OF FLIGHT ATTENDANTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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## QUESTION PRESENTED

Did the Courts below abuse their discretion in denying without prejudice a single claimant's motion to establish subclasses, when her claim of a conflict within the class—first asserted a year after the case had been tried, five months after a decision had been issued, and by counsel who for many years and until four days before had represented the class—was found to lack any evidentiary basis?

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# BRIEF OF ASSOCIATION OF FLIGHT ATTENDANTS IN OPPOSITION TO PETITION FOR CERTIORARI

## STATEMENT OF THE CASE

A. The claims of all individual plaintiffs in the original underlying action, *Romasanta v. United Airlines, Inc.*, were settled or dismissed in 1975. Thereafter, Liane McDonald intervened to seek class relief, *United Airlines, Inc. v. McDonald*, 432 U.S. 385 (1977), and in 1978 was designated representative of a class of former flight attendants terminated by United Air Lines ("United") pursuant to its "no-marriage" rule.

In late 1979, the District Court began to consider class-wide remedies, and the Association of Flight Attendants ("AFA") intervened to represent the incumbent flight attendants. 4a.[1] All parties agreed that it was essential to promptly resolve the class reinstatement claims, without awaiting conclusion of 1,800 individual entitlement hearings, Court Conference, September 18, 1980, Tr. 36, 39, 51, 55. An evidentiary trial was scheduled to determine whether reinstatement of the class with full retroactive seniority could be equitably awarded without causing "unusual adverse impact." *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 779 n.41 (1976) ("*Franks*"); 4a; 40a-41a. In pretrial conferences, all parties agreed that impact would be assessed under the reasonable assumption of reinstatement of 1,400 former flight attendants. 10a; 65a-66a n.16.

The District Court recognized that under *Franks* and *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977) *("Teamsters")*, retroactive seniority is presumptively warranted, but may be denied if it would result in "unusual adverse impact." 44a-45a, 48a. The Court carefully considered the all-pervasive significance of seniority to the flight attendant position, 62a-64a; 5a-7a, and each area of adverse impact which would be caused by reinstatement with full seniority of a class whose enormous size and seniority relative to the incumbent work force were unprecedented. 66a. On the basis of the evidence, the Court concluded that reinstatement with full retroactive seniority,

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[1]The Opinion of the Court of Appeals herein appears at pages 1a-39a of the separate Appendix to Barr's Petition, and citations herein to that Opinion are to pertinent pages in the Appendix. The Memorandum Opinion and Order of the District Court, issued January 8, 1982, is set out at pages 40a-93a of the Petition of Liane McDonald in 83-1180, and is unofficially reported at 31 Fair Empl. Prac. Cas. (BNA) 551. The District Court's implementing Order, issued July 12, 1982, is set out at pages 94a-98a of the McDonald Appendix. Citations herein to said Opinion and Orders are to the pertinent pages in the McDonald Appendix. Citations to the Appendix attached to Barr's Petition appear as "Barr A."

whether at once or as openings arose, to positions held on average for but 1½ years, AFA Ex. 17, and not since 1965–68, 43a, would cause unprecedented "unusual adverse impact" of "such grave proportions," 87a (including immediate and long-term loss of jobs and vital working conditions by thousands of incumbents), "that to ignore [it] would be a clear abuse of the Court's equitable discretion." *Id.*

The Court fashioned a remedy which "enable[s] the claimants to return to their jobs with the most favorable package of employment benefits which does not otherwise cause an unduly adverse impact" upon incumbents. 90a. It awarded class members full retroactive seniority for compensation and other significant benefits, other special relief, and retroactive competitive seniority equal to seniority accrued by claimants prior to termination. 88a and n.32, 89a, 95a-97a.

McDonald's motion to reconsider, seeking different relief (restoration of the "relative seniority" claimants held when terminated), was denied because its impact would be nearly as drastic as full retroactive seniority. 27a-30a and n.10.

It was not until April 26, 1982, nearly one year after the trial, five months after the District Court's ruling, and following denial of reconsideration, that a single claimant, Joyce Barr, represented by counsel who had represented the class from 1975[2] until just four days before,[3] first complained of a potential conflict within the class purportedly necessitating creation of subclasses. The District Court found no evidence of any conflict and denied the motion with leave to renew if a conflict should subsequently emerge. Barr A.6.

B. The Court of Appeals, acting on McDonald's interlocutory appeal, affirmed the District Court's rulings in all respects. It held that the trial court had proceeded properly

[2]Letter, K. Flaxman to Honorable James B. Moran, April 29, 1982.
[3]Transcript of Court Conference of April 22, 1982.

under *Franks* and *Teamsters* in evaluating the many facets of impact upon incumbents of an award of full retroactive seniority, 12a-20a, and found ample support for the findings of "unusual adverse impact," regardless of whether reinstatements were immediate or by openings, 21a-27a, or with "relative" rather than full seniority. 27a-30a and n.10. The Court affirmed the award of full retroactive seniority for certain purposes and of partial retroactive seniority for others, as providing, consistent with *Franks*, "the fullest possible relief for the class" that would not result in unusual adverse impact to incumbents. 32a, 36a-38a.

The Court also found, contrary to Barr's claim, that all parties—not simply McDonald—had agreed to use a class size of 1,400 in assessing impact. 10a; 65-66a n.16. Moreover, that number was demonstrated to be both "realistic" and "reasonable" and did not prejudice the class. 10a-12a. The Court further agreed with the timing of the District Court's consideration of the seniority claim, because claimants' desire for reinstatement might well turn on the quantum of seniority awarded, 10a, and "a case that has already been unresolved too long threatens to extend indefinitely if resolution of the seniority questions are delayed until completion of the class eligibility hearings." 11a. The Court found no basis to conclude that McDonald was "undermining the interests of some members of the class" in actively seeking both full retroactive seniority and back pay for the class. 11a. Barr's subsequent "Suggestion of Mootness" was rejected as "not well taken." Barr A.2. Her Petition for Rehearing and Suggestion for Rehearing *En Banc* was denied. Barr A.1.

C. Individual claimant entitlement hearings have proceeded on a continuing basis since April, 1983, for the most part in order of claimants' seniority. Many successful claimants, including a number junior to Barr, have been reinstated. Barr has bypassed the opportunity to proceed with her entitlement hearing, and hence secure "a speedy return to work." Petition for Certiorari ("Pet."), p. 9. A class-wide back pay trial has been held with no decision as yet.

## REASONS WHY THE WRIT SHOULD NOT BE GRANTED

**There are no important and recurring questions presented by the decisions of the Courts below denying without prejudice Barr's Suggestion for Sub-Classing which merit Supreme Court review.**

A. Plaintiffs here, as in most Title VII class actions, seek both monetary and non-monetary relief. There is nothing inherent in such a request which requires subclassing. Class members can receive either or both remedies without diminishing the entitlement or status of other class members, unlike the conflict which might exist within a class of applicants and incumbents, as referenced in cases Barr cites. Pet., pp. 9-10.[4]

Nor were the Courts below required to disqualify McDonald from continuing to represent the entire class merely because she obtained reinstatement.[5] Such a proposition would require a perpetual succession of class representatives, ending only when the last class member's claim had been determined. Even where the named plaintiff obtains complete relief, or her claim becomes moot, she may continue as class representative. *E.g., Sosna v. Iowa*, 419 U.S. 393, 403 (1975); *Sirota v. Solitron Devices, Inc.*, 673 F.2d 566, 572 (2d Cir.), *cert denied*, ___U.S.___, 103 S.Ct. 86 (1982); *cf. Deposit Guaranty National Bank v. Roper*, 445 U.S. 326, 339 (1980).

B. Barr has not demonstrated that the specific facts of this case required subclassing. While she baldly alleged below, as she does here, that McDonald adopted a "litigation

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[4]General Telephone Co. of Southwest v. Falcon, 457 U.S. 147 (1982); General Telephone Co. of Northwest v. EEOC, 446 U.S. 318 (1980). In East Texas Motor Freight Systems, Inc. v. Rodriguez, 431 U.S. 395 (1977), plaintiffs, unlike McDonald, suffered no injury and thus were not class members.

[5]McDonald was reinstated by Order dated March 1, 1979. While a handful of claimants are separately represented, no one (including Barr's counsel, who actively participated in this action since 1975, p. 3, *supra*), raised any objection to her continued representative status until Barr filed her subclassing motion on April 26, 1982. No one else has objected since.

strategy that favors those seeking financial benefits, rather than work, from this suit," Pet., pp. 7, 6, 11, the District Court, with a "keener appreciation of the peculiar facts and circumstances," *Franks*, 424 U.S. at 780, *quoting Albemarle Paper Co. v. Moody*, 422 U.S. 405, 421-22 (1975), found that "the argument in the face of what we have been through flies in the face of reality," Barr A.4,6, and the Court of Appeals agreed. 11a. These determinations are fully supported.

First, there is no factual basis for Barr's claim that McDonald pursued a strategy aimed at delaying claimants' return to work to inflate monetary relief. Pet., p. 11. All parties and the Courts below recognized the necessity for prompt resolution of the reinstatement/seniority claims and the possibility that the desires of class members for reinstatement might be affected by the quantum of seniority relief awarded. 10a; Status Conference, September 18, 1980, Tr. 36, 39, 51, 55; *see also* Barr Suggestion for Sub-Classing, p. 2.[6]

Second, no conflict necessitating subclassing was presented because a single claimant, Barr, suddenly decided, a year *after* the case had been tried and months *after* a decision had been issued, that she did not agree with the informed judgment of designated class counsel (in which her own counsel had fully concurred while serving as class counsel) to proceed to trial on a reasonable estimate of a class size of 1,400. This was "the number upon which the AFA, United and McDonald agreed at pretrial conferences," 10a, 65a-66a n.16,[7] "because all the parties recognized that some figure had to be used for purposes of resolving the reinstatement issues in this case." 10a. Unlike *Teamsters*, where the paucity of evidence precluded any assessment of class size, 431 U.S. at 375-76, or *Franks*, where few claimants

[6]Because of the interrelationship between the seniority award and desire for reinstatement, claimants have been permitted to defer entitlement hearings to await final resolution of the seniority issue. Memorandum and Order, July 8, 1983. Many, while remaining fully interested in reinstatement, have selected this option.

[7]Barr's counsel participated at these transcribed pretrial conferences on behalf of the class (including Barr) and raised no objection to the 1,400 figure.

professed an interest in hire, 424 U.S. at 766 n.36 and 799 n.20 (Powell, J., concurring and dissenting),[7] there was ample record support in this case for the reasonableness of the "1400" number,[8] and its use did not prejudice the class. 11a, 12a.[9] Because the 1,400 number was found to be reasonable, agreement to its use cannot demonstrate inadequacy of class representation or the need for subclassing, and Barr's motion for subclassing was properly denied without prejudice.[10] Any further claim by Barr of inadequacy of representation was obviated by permitting her separate representation by counsel of choice and the opportunity to present any positions she desired with respect to any and all issues. *See Hansberry* v. *Lee*, 311 U.S. 32, 42-43 (1940). Should any conflict within the class emerge hereafter, appropriate action can then be taken, as the District Court recognized. Barr A.6.

Third, McDonald has placed no roadblocks in the path of claimants "who would gladly trade off back pay for a speedy return to work." Pet., p. 9. Numerous prevailing claimants have been reinstated. Barr, despite her professed priorities,[11] has to date not elected to proceed with her entitlement hearing; she has voluntarily bypassed her opportunity for "a speedy return to work." *Id.*

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[7]Here, only 3% of the claimants expressed disinterest in reinstatement. AFA Ex. 40; Tr. 2310.

[8]McDonald can be expected to support Barr's attack on the 1400 number as another means of challenging the substantive rulings below. But, as indicated, she stipulated to the class size. Lower figures she attempted to substitute at trial were found unsupportable. 10a; 65a-66a n.16.

[9]The decisions below were not "advisory," as Barr contends in her brief in support of the Petition in 83-1180, p. 7. They resolved a "definite and concrete" controversy, "touching the legal relations of parties having adverse legal interests," Aetna Life Insurance Co. v. Haworth, 300 U.S. 227, 240-41 (1937), and were confined "to the facts of this case." FCC v. Pacifica Foundation, 438 U.S. 726, 744 (1978).

[10]Any conflict among class counsel, rather than within the class, would not necessitate subclassing. Slade v. Shearson, Hammill & Co., 18 Fed.R.Serv.2d 265, 269 (S.D.N.Y 1974). Barr's counsel ceased representing the class with the filing of Barr's subclassing request.

[11]No affidavit of Barr has ever been introduced.

## CONCLUSION

For the foregoing reasons, Barr's petition for a writ of certiorari should be denied.

Respectfully submitted,

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